

Serial No.: 10/632,491

Art Unit: 1732

**REMARKS**

This is a full and timely response to the outstanding non-final Office Action mailed February 27, 2006. Through this response, claims 1, 4, 5, 7, 9-20, and 23-24 have been amended. Reconsideration and allowance of the application and pending claims 1-5, 7-20, and 22-24 are respectfully requested.

**I. Claim Rejections - 35 U.S.C. § 103(a)****A. Rejection of Claims**

Claims 1-5 and 23 have been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Whissell* ("Whissell," U.S. Pat. No. 4,802,836) in view of *Battle* ("Battle," U.S. Pat. No. 5,358,214). Claims 7, 8, and 9-20 have been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Whissell* in view of *Battle*, and further in view of *LaCroix* ("LaCroix," U.S. Pat. No. 6,113,379) and *Stuckey* ("Stuckey," U.S. Pat. No. 1,872,522). Claims 9-20 have been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Whissell* in view of *Battle*, and further in view of *LaCroix* and *Stuckey*, and further in view of *Knipper* ("Knipper," U.S. Pat. No. 3,509,250), *Rasmussen* ("Rasmussen," U.S. Pat. No. 2,475,435), and *Wittke* ("Wittke," U.S. Pat. No. 2,532,049). Claim 22 has been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Whissell* in view of *Battle*, and further in view of *Koyama* ("Koyama," U.S. Pat. No. 3,662,438). Claim 23 has been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Whissell* in view of *Battle*, and further in view of *Knipper*, *Rasmussen*, and *Wittke*. Claim 24 has been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over *Whissell* in view of *Battle*, *LaCroix* and *Stuckey*. Applicants respectfully traverse these rejections.

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## **B. Discussion of the Rejection**

As has been acknowledged by the Court of Appeals for the Federal Circuit, the U.S. Patent and Trademark Office ("USPTO") has the burden under section 103 to establish a proper case of obviousness by showing some objective teaching in the prior art or generally available knowledge of one of ordinary skill in the art that would lead that individual to the claimed invention. See *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988). Accordingly, to make a proper case for obviousness, there must be a prior art teaching or established knowledge that would suggest to a person having ordinary skill in the pertinent art to fill the voids apparent in the applied reference. It is respectfully asserted that no such case has been made in the outstanding Office Action.

### **Independent Claim 1, Dependent Claims 2-5 and 23**

Applicants respectfully submit that the proposed combination of references is not obvious. One indication that the proposed combination is not obvious is that the proposed combination is improper. In particular, the Office Action improperly fails to enlist an "as a whole" analysis, and has also failed to show a proper motivation to combine *Whissell* and *Battle*. The Office Action provides the following on page 3:

Whissell appears to be silent to:

b) inserting a filler plug into the side of the mold between a partition plate and a pallet

However, *Battle* teaches inserting a filler plug into the side of the mold between a partition plate and a pallet.

It would have been prima facie obvious to one of ordinary skill in the art at the time of the invention to incorporate the method of *Battle* into that of *Whissell* for the following reasons: a) *Battle* teaches that stripping of the part from a mold causes serious problems since the adherence thereof to the mold itself and to the strips causes stresses to be formed in precastings, causing deterioration thereof, which *Battle's* method resolves b) *Battle* suggests use in precastings, and *Whissell's* concrete blocks are considered to be precastings.

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According to established case law, "Title 35, section 103, requires assessment of the invention as a whole. This "as a whole" assessment of the invention requires a showing that an artisan of ordinary skill in the art at the time of the invention, confronted by the same problems as the inventor and with no knowledge of the claimed invention, would have selected the various elements from the prior art and combined them in the claimed manner. *Princeton Biochemicals Inc. v. Beckman Coulter Inc.*, 75 U.S.P.Q.2d. 1051, 1054 (Fed. Cir. 2005). This showing has simply not been set forth. Assuming *arguendo* that *Batlle* addresses the problems associated with stripping a mold and *Whissell* addresses precastings as explained in the Office Action, such a recitation in the Office Action is irrelevant to an inquiry into what an artisan of ordinary skill in the art would do when confronted with the same problems as the inventor, or what would have motivated an artisan to combine the elements of claim 1. Simply put, the Office Action fails to apply an "as a whole" assessment and fails to provide a motivation to combine. As expressed in *Yamanouchi Pharmaceutical Co. v. Danbury Pharmacal Inc.*, 231 F.3d 1339, 56 U.S.P.Q.2d 1641, 1644 (Fed. Cir. 2000), "[V]irtually all [inventions] are combinations of old elements.' Therefore, an Examiner [or accused infringer] may often find every element of a claimed invention in prior art. If identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would ever issue. Furthermore, rejecting patents solely by finding prior art corollaries for the claimed elements would permit an Examiner [or accused infringer] to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat patentability of the claimed invention. To counter this potential weakness in the obviousness construct, the suggestion to combine requirement stands as a critical safeguard against hindsight analysis and rote application of the legal test for obviousness." Thus, Applicants respectfully request that the rejection to claims 1-5 and 23 be withdrawn.

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### Claims 7, 8 and 9-20

Applicants respectfully submit that the proposed combination of *Whissell*, *Batlle*, *LaCroix*, and *Stuckey*, assuming *arguendo* a proper combination, fails to disclose, teach, or suggest “*opposing side gussets*” as provided in claim 7. *LaCroix* is concerned with addressing the perceived problems associated with splitting techniques by incorporating a mechanism to provide a textured surface without the need for splitting. (see col. 1, lines 15-22 and col. 2, lines 62-67) *LaCroix* appears to show in Figure 7 molded angular sides, which Applicant respectfully submits would not be understood by those having ordinary skill in the art as equivalent to gussets. For instructional purposes, Applicants have attached Exhibit A, which is a web-page from an on-line *Webster’s* dictionary. Exhibit A provides one exemplary definition for the term “gusset,” which clearly does not encompass the molded angular side as shown in Figure 7 of *LaCroix*. Further, the assertion that gussets are known based on a figure that does not show a gusset would be improper, and thus Applicants respectfully request that such an assertion of well-known be withdrawn.

Applicants respectfully submit that the addition of *Stuckey* does not remedy these deficiencies. The Office Action alleges on page 4 that *Stuckey* teaches “side gussets,” and that “*Stuckey* teaches a ‘shoe’ having an angular surface which would create a bevel.” Applicants respectfully disagree. For similar reasons presented above, Applicants respectfully submit that a “gusset” as that term is understood by those having ordinary skill in the art is not shown in *Stuckey*. Further, Applicants respectfully submit that a groove, as described in *Stuckey*, is not the same as a bevel, and that such a groove as described in *Stuckey* does not have a “*substantially constant angle of inclination*.”

With regard to claim 8, Applicants respectfully submit that the shoes having an angular surface are not shown in *Stuckey*, but quite differently, the mold box 27 is described as having

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members 28 and 29 with projections. (see page 3, lines 29-40) A mold box is not a shoe. Accordingly, Applicants respectfully request that the rejection to claim 8 be withdrawn.

With regard to claims 9-20, Applicants respectfully submit that the comments regarding patentable weight have been rendered moot in view of the claim amendments, and thus, reconsideration of the amended claims is respectfully requested. Further, Applicants respectfully submit that it has not been established that the process steps are known for at least the reasons presented above. Hence, Applicants respectfully request that the allegation of known process steps be withdrawn or fully supported in the next Office Action.

Additionally, for similar reasons presented above in association with independent claim 1 and claims 2-5 and 23, Applicants respectfully submit that the proposed combination used to reject claims 7, 8, and 9-20 is not obvious. For instance, the proposed combination is improper for at least the failure to enlist an "as a whole" analysis or show a proper motivation to combine *Whissell*, *Battle*, *LaCroix*, and *Stuckey*. The improper combination of *Whissell* and *Battle* in terms of the "as a whole" analysis and motivation to combine has been described above, and Applicants' arguments pertaining to improper combination of *Whissell* and *Battle* likewise applies to claims 7, 8, and 9-20.

Further, Applicants respectfully submit that *LaCroix* teaches away from *Stuckey*. As explained above, *LaCroix* is concerned with addressing the perceived problems associated with splitting techniques by incorporating a mechanism to provide a textured surface without the need for splitting. (see col. 1, lines 15-22 and col. 2, lines 62-67) *Stuckey*, on the other hand, teaches the use of splitting techniques as an improvement over prior art techniques. As is well established in the law, "[t]here is no suggestion to combine . . . if a reference teaches away from its combination with another source . . . A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference,

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or would be led in a direction divergent from the path that was taken by the applicant . . .” *Tec Air, Inc. v. Denso Manufacturing Michigan Inc.*, 192 F.3d 1353, 52 USPQ2d 1294 (Fed. Cir. 1999). Further, as provided in *Bausch & Lomb, Inc. v. Barnes-Hind/Hydrocurve, Inc.*, 796 F.2d 443, 230 U.S.P.Q. 416 (Fed. Cir. 1986), “[I]t is impermissible within the framework of 35 U.S.C. § 103 to pick and choose from any one reference only so much of it as will support a given position to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one skilled in the art.” For at least the above described reasons, Applicants respectfully submit that the proposed combination of *Whissell*, *Battle*, *LaCroix*, and *Stuckey* is improper, and respectfully request that the rejection be withdrawn.

#### Claims 9-20

Applicants respectfully submit that the proposed combination of *Whissell*, *Battle*, *LaCroix*, *Stuckey*, *Knipper*, *Rasmussen*, and *Witke* is not obvious. For similar reasons presented above, Applicants respectfully submit that at least since the proposed combination of *Whissell*, *Battle*, *LaCroix*, and *Stuckey* is improper, the rejection of claims 9-20 using the addition of *Knipper*, *Rasmussen*, and *Witke* to the proposed combination is improper as well.

Further, Applicants respectfully submit that a motivation to combine has not been properly established in combining *Knipper*, *Rasmussen*, and *Witke*. *Witke* is directed to a mold for making hollow concrete blocks. As addressed in the prior response, *Knipper* has nothing to do with methods for forming masonry units, but in quite considerable contrast, is directed to a method and apparatus for making window frames. *Rasmussen* deals with concrete block molds that address enabling undercut locking grooves and facilitating removal of the block (see column 1). According to established case law, “Title 35, section 103, requires assessment of the invention as a whole. This “as a whole” assessment of the invention requires a showing that an artisan of ordinary skill in

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the art at the time of the invention, confronted by the same problems as the inventor and with no knowledge of the claimed invention, would have selected the various elements from the prior art and combined them in the claimed manner. *Princeton Biochemicals Inc. v. Beckman Coulter Inc.*, 75 U.S.P.Q.2d 1051, 1054 (Fed. Cir. 2005). Applicants respectfully submit that this showing has simply not been set forth.

Additionally, Applicants respectfully submit that the recent claim amendments to claims 9-20 render moot the rejection of claims 9-20. Accordingly, Applicants respectfully request that the rejection be withdrawn.

#### **Claim 22**

Applicants respectfully submit that the proposed combination of *Whissell*, *Battle*, and *Koyama* is not obvious. For similar reasons presented above, Applicants respectfully submit that at least since the proposed combination of *Whissell* and *Battle* is improper, the rejection of claim 22 using the addition of *Koyama* to the proposed combination is improper as well. Accordingly, Applicants respectfully request that the rejection be withdrawn.

#### **Claim 23**

Applicants respectfully submit that the proposed combination of *Whissell*, *Battle*, *Knipper*, *Rasmussen*, and *Wittke* is not obvious. For similar reasons presented above, Applicants respectfully submit that at least since the proposed combination of *Whissell* and *Battle* is improper, the rejection of claim 23 using the addition of *Knipper*, *Rasmussen*, and *Wittke* to the proposed combination is improper as well. Also, as explained above, Applicants respectfully submit that the proposed combination of *Knipper*, *Rasmussen*, and *Wittke* is also improper. Accordingly, Applicants respectfully request that the rejection be withdrawn.

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#### Claim 24

Applicants respectfully submit that the proposed combination of *Whissell, Batlle, LaCroix, Stuckey* and *Koyama* is not obvious. For similar reasons presented above, Applicants respectfully submit that at least since the proposed combination of *Whissell, Batlle, LaCroix*, and *Stuckey* is improper, the rejection of claim 24 using the addition of *Koyama* to the proposed combination is improper as well. Accordingly, Applicants respectfully request that the rejection be withdrawn.

#### Assertions of well-known art

The Office makes several assertions of well known art or like-assertions, including "Whissell teaches the well known aspects..." (pages 2 and 7), "Whissell strips by lowering the pallet, a step which is conventional and common in the art..." (page 3), "it is the Examiner's position that when the process steps are known..." (pages 3 and 4), "LaCroix teaches that such side gussets are known..." (page 4). These and any other assertions of well-known or commonly known are herein traversed. In particular, Applicants respectfully traverse these findings of well-known art and submit that the subject matter noted above should not be considered well known since the Office Action does not include specific factual findings predicated on sound technical and scientific reasoning to support the conclusions, as required. The MPEP defines the standard with regard to taking official notice and "well-known" assertions. As provided in MPEP §

2144.03:

Official notice without documentary evidence to support an examiner's conclusion is permissible only in some circumstances. While "official notice" may be relied on, these circumstances should be rare when an application is under final rejection or action under 37 CFR 1.113. Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known. As noted by the court in *In re Ahlert*, 424, F.2d 1088, 1091, 165 USPQ 418, 420 (CCPA 1970), the notice of



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facts beyond the record which may be taken by the examiner must be "capable of such instant and unquestionable demonstration as to defy dispute" (citing *In re Knapp Monarch Co.*, 296 F.2d 230, 132 USPQ 6 (CCPA 1961)).

As provided in MPEP § 2144.03 (emphasis added):

If applicant adequately traverses the examiner's assertion of official notice, *the examiner must provide documentary evidence in the next Office action* if the rejection is to be maintained. See 37 CFR 1.104(c)(2).

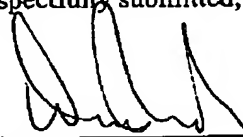
Applicants respectfully submit that in the context of the claim language, such findings of well-known art are improper given the added complexity associated with such features as inserting a filler plug and forming a filler plug effect in the compressed mix whereby a masonry unit having a filler plug effect is provided. Accordingly, Applicants traverse the Examiner's assertions with regard to well-known use. Because of this traversal, the Examiner must support his finding with evidence, or withdraw the well-known determination.

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**CONCLUSION**

Applicants respectfully submit that Applicants' pending claims are in condition for allowance. Favorable reconsideration and allowance of the present application and all pending claims are hereby courteously requested. Any other statements in the Office Action that are not explicitly addressed herein are not intended to be admitted. In addition, any and all findings of inherency are traversed as not having been shown to be necessarily present. If, in the opinion of the Examiner, a telephonic conference would expedite the examination of this matter, the Examiner is invited to call the undersigned attorney at (770) 933-9500.

Respectfully submitted,



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Thesaurus

### gusset

One entry found for gusset.

Main Entry: **gus·set**   
Pronunciation: 'g&-s&t  
Function: *noun*

Etymology: Middle English, piece of armor covering the joints in a suit of armor, from Middle French *gousset*  
1 : a usually diamond-shaped or triangular insert in a seam (as of a sleeve, pocketbook, or shoe upper) to provide expansion or reinforcement  
2 : a plate or bracket for strengthening an angle in framework (as in a building or bridge)  
- *gusset transitive verb*

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Pronunciation Symbols

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